



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

999 18TH STREET- SUITE 300

DENVER, CO 80202-2466

Phone 800-227-8917

<http://www.epa.gov/region08>

OCT 12 2005

Ref: 8ENF-W-NP

CERTIFIED MAIL 7004-1350-0001-5668-2253
RETURN RECEIPT REQUESTED

Mr. Darin Hersch
Registered Agent
RHR Construction, Inc.
3217 Fiechtner Dr.
Fargo, North Dakota 58103-2358

Re: Administrative Order under the Clean
Water Act 33 U.S.C. § 309(a)

Dear Mr. Hersch:

On July 21, 2005, the United States Environmental Protection Agency (EPA) observed the Elmwood Court Development in West Fargo, North Dakota regarding compliance with the Clean Water Act and its storm water regulations applicable to construction sites. At the time of the observations, EPA inspectors identified alleged storm water violations, including failure to implement best management practices ("BMPs") as required under your permit. Accordingly, the EPA has filed an Administrative Order ("Order") which requires you to come into compliance with the storm water regulations and your permit. The Order specifies the nature of the violations under the Clean Water Act, 33 U.S.C. § 1251, et seq. (the "CWA") for your construction activities at the Elmwood Court Development. The authority for such action is provided to EPA under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The Order describes the actions necessary for RHR Construction to achieve compliance with the CWA.

The CWA requires the Administrator of EPA to take all appropriate enforcement actions necessary to secure prompt compliance with the CWA and any Orders issued thereunder. Section 309 of the CWA provides a variety of possible enforcement actions, including the filing of a civil or criminal action (33 U.S.C. §§ 1319(b), (c), (d), and (g)). Section 508 allows for debarment from Federal contracts and/or loans for any noncompliance with the CWA or with an Order issued pursuant to the CWA (33 U.S.C. § 1368).

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, U.S. EPA Small Business Resources, containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. The inclusion of this information sheet does not necessarily mean that EPA has determined that your organization

is a small business. SBREFA does not eliminate your responsibility to comply with the requirements of this Order.

Please review the Order carefully. Failure to comply with the requirements of the Order shall constitute a violation of said Order. If you have any questions regarding this letter, or the enclosed Order, the most knowledgeable people on my staff regarding these matters are Darcy O'Connor for storm water requirements at (303) 312-6392, and Alicia Hoegh for legal issues at (303) 312-6876

Sincerely,

Eddie A. Sierra
for Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures: Administrative Order
Statement of Certification
SBREFA information sheet

cc: Tina Artemis, Regional Hearing Clerk
Dennis Fewless, NDDH

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

REGION 8

Docket No. **CWA-08-2006-0001**

2005 OCT 12 PM 2:14

RHR Construction, Inc.
3217 Fiechtner Dr.
Fargo, North Dakota 58103-8735

Respondent.

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ADMINISTRATIVE ORDER

FILED
EPA REGION VIII
HEARING CLERK

INTRODUCTION

1. This administrative order is authorized by Congress in sections 309(a)(3) and 308 of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act), 33 U.S.C. §§ 1319(a)(3) and 1318.
2. The undersigned EPA official has been properly delegated the authority to issue this order.
3. EPA alleges that Respondent has violated the Act and/or regulations and requires Respondent to achieve and maintain compliance, as more fully explained below.

FINDINGS OF FACT AND LAW

4. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the Act, including section 402, 33 U.S.C. § 1342.
5. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which EPA and, upon receiving authorization from EPA, states may permit discharges into navigable waters, subject to specific terms and conditions.
6. Section 402(p) of the Act, 33 U.S.C. § 1342(p), requires that any discharge of storm water associated with an industrial activity comply with the requirements of an NPDES permit.
7. As directed by section 402(p) of the Act, 33 U.S.C. § 1342(p), EPA has issued regulations that further define requirements for NPDES permits for storm water discharges. The regulations include those codified at 40 C.F.R. part 122.26.

8. EPA's regulations define discharges associated with industrial activity to include construction activity. 40 C.F.R. § 122.26(b)(14)(x).
9. EPA's regulations require each person who discharges storm water associated with industrial activity to obtain coverage under either an individual permit or a promulgated general permit. 40 C.F.R. § 122.26(c).
10. EPA authorized North Dakota to assume primary responsibility for issuing NPDES permits for discharges in that state. 40 FR 28663, July 8, 1975.
11. The State of North Dakota issued a general NPDES permit authorizing discharges of storm water associated with construction activities, if done in compliance with the conditions of the permit. The permit is no. NDR10-0000. The version currently in effect was issued effective October 11, 2004 and will expire on September 30, 2009.
12. The permit requires, among other things, that a person discharging pollutants implement best management practices ("BMPs"). BMPs include structural controls (such as silt fences) and management practices (such as a dedicated concrete washout area and street sweeping).
13. Respondent is a North Dakota corporation and is doing business in the State of North Dakota.
14. Respondent is a "person" as that term is defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
15. As a "person," the Respondent is subject to the requirements of the Act and 40 C.F.R. part 122.
16. Respondent owns and/or has been engaged in construction activities at a facility called Elmwood Court Development located within Section 18, Township 139N, Range 49W in West Fargo, North Dakota.
17. Respondent conducted construction activities within a part of a larger common plan of development or sale whose total land disturbing activities totaled five acres or greater.
18. Respondent is therefore engaged in an "industrial activity" as defined by EPA regulations. 40 C.F.R. § 122.26(b)(14).
19. The runoff and drainage from the Respondent's facility is "storm water" as defined in 40 C.F.R. § 122.26(b)(13).

20. Storm water contains "pollutants" as defined by section 502(6) of the Act, 33 U.S.C. § 1362(6).
21. Storm water, snow melt, surface drainage and runoff water leaves the Respondent's facility and flows into the City of West Fargo's Phase II municipal separate storm sewer system (MS4).
22. The City of West Fargo's MS4 discharges into the Cass County Drain 21 which discharges to the Sheyenne River.
23. The Sheyenne River is a "navigable water" and "waters of the United States," as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 C.F.R. § 122.2, respectively.
24. The storm water runoff from Respondent's facility is the "discharge of a pollutant" as defined by section 502(12) of the Act, 33 U.S.C. § 1362(12) and 40 C.F.R. § 122.2.
25. Respondent's construction activity at its facility is a "point source" as that term is defined in section 502(14) of the Act, 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2.
26. On April 04, 2005, Respondent submitted a notice of intent ("NOI") for coverage of storm water discharges from all of its small construction sites (land disturbance of equal to or greater than one acre and less than five acres) by North Dakota Permit no. NDR10-0000 and was issued a NPDES permit No. NDR10-1062.
27. On July 21, 2005, authorized EPA employees observed the Respondents facilities located at lot 1 block 8 and lot 30 block 7 of the Elmwood Court Addition from a public street for compliance with the Act and EPA's regulations.
28. The July 21, 2005 observations revealed that Respondent was not implementing Best Management Practices ("BMPs") to minimize environmental impacts from storm water discharges.
29. The July 21, 2005 observations revealed that there was sediment build up in the adjacent streets.

COUNT 1

30. The permit requires Respondent to implement best management practices (BMPs) to minimize the impact of Respondent's construction activities on waters of the United States. At the time of the July 21, 2005 observations, adequate BMPs were not in place and no BMP was in place to prevent concrete wash out and sediment build up in the adjacent street.

31. Respondent's failure to implement BMPs is in violation of the permit and therefore constitutes violations of the Act. 33 U.S.C. §§ 1319 and 1342(p).

ORDER FOR COMPLIANCE

Respondent is ordered to perform the following actions:

32. Respondent is ordered to comply fully with all requirements of North Dakota Permit no. NDR10-0000, including but not limited to all requirements relating to developing and implementing a Storm Water Pollution Prevention Plan ("SWPP plan"), implementing all BMPs required by the permit or the SWPP plan, inspecting its construction site and documenting the inspections, and submitting a Notice of Termination. In addition, the Respondent shall:
- a. no later than ten days after receiving this Order, submit a NOI for large construction activity to the North Dakota Department of Health ("NDDH") and a copy to EPA for construction activity at the Elmwood Court Development;
 - b. no later than ten days after receiving this Order, provide documentation to EPA that the violations identified above have been corrected;
 - c. submit copies of the all Site Inspection Records ("SIRs") quarterly to EPA and the North Dakota Department of Health, with each report to be due 10 days after the end of each calendar quarter (October 10, 2005, January 10, 2006, April 10, 2006, etc.) for the life of the construction project or until written notice is given by EPA that the submissions can cease, with each quarterly report to include all SIRs for that quarter;
 - d. no later than fifteen (15) days after receiving this Order, submit to EPA the SWPP plan; and
 - e. within thirty (30) days of receipt of this Order, submit written documentation, including photographs, that best management practices have been developed and implemented as required by the permit and detailed in the SWPP plan, including, but not limited to, erosion control and good housekeeping practices.

ADDITIONAL PROVISIONS

33. Within forty-five (45) days of receipt of this Order, provide the following information:
- a. The type of entity your company is (e.g., corporation, limited liability company, partnership, or sole proprietorship, etc.).
 - b. The date and place of your company's incorporation and/or registration, as well as the address, telephone number, and name(s) of the owner of the company.

- c. The number of employees across all facilities and operations owned by your company. Please identify the number of employees working in the State of North Dakota.
- d. The nature of your involvement at the Elmwood Court Development (e.g., owner, developer, builder, general contractor, subcontractor, etc.). If your company was both an owner and builder, please indicate that here. If your company's involvement was other than as an owner, such as a builder, general contractor or sub-contractor, please provide the name, address, phone number for the company/person with whom you contracted.
- e. If your involvement was as an owner, identify the number of acres of the Elmwood Court Development your company purchased and the condition of the property/lot(s) at the time you assumed ownership (i.e., was the property undisturbed, graded, etc.). Include a copy of the contract for sale, deed of sale, and any existing photographs of the property. Include the date the photographs were taken and the name of the photographer, if known.
- a. If your involvement was as a builder, general contractor or sub-contractor, please identify the number of acres at the Elmwood Court Development your company had day-to-day control over, and the condition of the property at the time you assumed control (i.e., was the property undisturbed, graded, etc.). Include a copy of the contract your company had with the owner of the property/lot(s) and any existing photographs of the property. Include the date the photographs were taken and the name of the photographer, if known.
- b. Provide the date when ground disturbing activities began on the portion of the Elmwood Court Development that you owned or had day-to-day control over, and the date when the area was finally stabilized (if applicable) or sold.
- c. Describe your responsibilities related to storm water discharges at the Elmwood Court Development, including, but not limited to, the construction, installation and/or maintenance of BMPs at the site. Provide a copy of any contracts or written agreements relating to your responsibility for storm water discharges.
- d. If you hired or worked with other companies or people for the purpose of storm water permitting, compliance, or inspections at the Elmwood Court Development, provide a list of those companies or people, and a copy of all contracts or other documents related to such work.

- e. Provide copies of all storm water self-inspections conducted at the site. If inspections were not completed, please state so in your response. If inspections were conducted but no report was generated, provide a list of when, where and by whom self-inspections were conducted.
- f. Describe any communications, oral or written, you had with NDDH and/or the City of West Fargo regarding storm water requirements. Provide copies of the written correspondence and all existing written notes of any verbal communication.

OTHER PROVISIONS

- 34. EPA regulations protect confidential business information. See 40 C.F.R. part 2, subpart B. If Respondent asserts a business confidentiality claim for information required to be submitted under this order, Respondent shall provide such information only to EPA, and EPA will determine if the information the Respondent has designated meets the criteria in 40 C.F.R. § 2.208 for being treated as confidential. Unless Respondent asserts a confidentiality claim at the time the information is submitted, the information shall be provided to both EPA and the North Dakota Department of Health as specified in this Order, and EPA may make the information available to the public without further notice to the Respondent.
- 35. All written notices and reports required by this Order shall be sent to the following addresses:

Darcy O'Connor (8ENF-W-NP)
U.S. EPA Region 8
NPDES Enforcement Unit
Office of Enforcement, Compliance
and Environmental Justice
999 18th Street, Suite 300
Denver, Colorado 80202-2466
- 36. Any failure to comply with the requirements of this Order shall constitute a violation of this Order and may subject the Respondent to penalties as provided under the Act.
33 U.S.C. § 1319.
- 37. This Order does not constitute a waiver or modification of the terms and conditions of North Dakota Permit no. NDR10-0000, which remains in full force and effect, or of any other legal responsibility or liability of the Respondent.

38. This Order does not constitute a waiver of or election by EPA to forego any civil or criminal action to seek penalties, fines or other relief under the Act. The Act authorizes EPA to seek civil penalties of up to \$32,500 per day for each violation of the Act, and fines and imprisonment for willful or negligent violations. 33 U.S.C. § 1319; 40 CFR part 19.

Date: 10/12/2005

By: Eddie A. Sierra
for Carol Rushin
Assistant Regional Administrator

IN THE MATTER OF: RHR Construction, Inc., Respondent.

CERTIFICATE OF SERVICE

I certify that the attached amended administrative order was sent this day in the following manner to the addressees below:

Original and one copy hand delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection
Agency (8RC)
Region VIII
999 18th Street
Denver, CO 80202-2405

Copy by certified mail, return receipt requested to:

Mr. Darin Hersch
Registered Agent
3217 Fiechtner Dr.
Fargo, North Dakota 58103-2358

October 12, 2005
Date

Juanita Watston